80-1150

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1980

ALVIS L. SMITH, :

PETITIONER, :

-versus- : CASE #_____

STATE OF GEORGIA, :

RESPONDENT :

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF GEORGIA

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QUESTION PRESENTED

Was the right of the Petitioner to due process of law as outlined under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by the fact that the trial judge in the case did not charge the jury on the only defense presented by the evidence in the case, that being the defense of alibi.

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FROM THE COURT OF APPEALS

OF THE STATE OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Order of the Supreme Court of Georgia denying a Writ of Certiorari entered on the 24th day of September, 1980, and the Judgment of the Court of Appeals of the State of Georgia entered on the 2nd day of September, 1980.

OPINION BELOW

The Order of the Supreme Court of Georgia denying the Writ of Certiorari from the Opinion and Judgment of the Court of Appeals of Georgia was not accompanied by an official opinion (see Appendix B), but the Court of Appeals of Georgia wrote an official opinion dated September 2, 1980, (see Appendix A).

JURISDICTION

The final Order of the Georgia Supreme Court denying the Writ of Certiorari was made and entered on September 24, 1980. Since substantial federal questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Sec. 2, of the Constitution of the United States , 28 United States Code §1257(3), and Rule 19(1) of the Rules of the United States Supreme Court.

QUESTION PRESENTED

Was the right of the Petitioner to due process of law as outlined under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by the fact that the trial judge in the case did not charge the jury on the only defense presented by the evidence in the case, that being the defense of alibi.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated as follows:

A. STATEMENT OF PLEADINGS IN THE CASE:

A felony indictment being No. 5316 was returned by the grand jury of Catoosa County, Georgia, charging the Petitioner herein with

the commission of rape, which offense is alleged to have occurred on December 25, 1975, in Catoosa County, Georgia. (R. 5,6)

The Petitioner herein entered a plea of not guilty to the charge in the indictment and subsequent to that, a jury trial was had and a guilty verdict returned on October 10, 1979. The Petitioner was then sentenced to serve fifteen (15) years in the Georgia State Penitentiary. (R. 17, 18)

B. STATEMENT OF FACTS:

During the trial of the case sub judice, the State introduced the testimony of Walter Smartt, then an FBI agent, who investigated the charges pending against the Applicant in January, 1976. Agent Smartt took a statement from the Petitioner and during the conversation between Agent Smartt and Petitioner, the Petitioner stated that he knew the alleged victim, but had never left the Chattanooga area with her. (T. 99)

The State also offered the testimony of Charles Black, who in 1976 was an investigator with the Catoosa County Sheriff's

Department. Investigator Black also took a statement from the Petitioner in January, 1976, and the Petitioner told the investigator during their conversation that he had been out with the victim three (3) times but that he had never been to Georgia with her. (T. 108) (Emphasis supplied)

After the State closed their presentation of the facts, the Petitioner did not present any evidence and rested on his plea of not guilty.

REASONS FOR GRANT OF WRIT OF CERTIORARI

WAS THE RIGHT OF THE PETITIONER TO DUE PROCESS OF LAW AS OUTLINED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES VIOLATED BY THE FACT THAT THE TRIAL JUDGE IN THE CASE DID NOT CHARGE THE JURY ON THE ONLY DEFENSE PRESENTED BY THE EVIDENCE IN THE CASE, THAT BEING THE DEFENSE OF ALIBI.

In HENDERSON vs. STATE, 148 Ga. App. 659, the Court of Appeals stated their rule relative to the trial court's duty to charge on the defense of alibi. The Court stated:

> "Both this court and the Supreme Court have consistently held that where alibi is the sole defense of the accused, the failure of the trial court to charge on the defense of alibi, even in the absence of a request, is reversible error where there is some evidence to support it." PEPPER vs. STATE, 143 Ga. App. (1); HOWARD vs. STATE, 141 Ga. App. 238, 239 (4) and cites (p. 661).

The Court of Appeals, in its opinion (p. 1) took the position that the statements made by the Petitioner to Agent Smartt and Investigator Black were insufficient to raise the defense of alibi.

Petitioner contends most strongly that both statements made by him to the investigating officers were unequivocal in their meaning that the Petitioner maintained that he had never been with the alleged victim in Catoosa County, Georgia, which was the proven

scene of the crime charged against him.

As seen in HENDERSON, supra, the charge on alibi must be given where there is some evidence to support it (emphasis supplied) and for the Court of Appeals to merely ignore the dictate of HENDERSON by not recognizing that there was clearly some evidence to support the defense is clearly error.

The Court of Appeals in its opinion (pp. 1,2) goes further in stating that even should the statements made by the Petitioner raise the defense of alibi, the charge need not be given by the Court because the statements supporting the charge were not sworn to. In reaching this conclusion, the Court of Appeals relies on several cases including FIELDS v. STATE, 233 Ga. 723, 724 (3) dealing with the old unsworn statement which used to be a facet of our state's criminal procedure.

Petitioner contends that the Court of Appeals analogy in applying the procedure of making an unsworn statement to the issue argued by the Petitioner is unfounded. Would

the Court of Appeals or the State of Georgia argue that an out-of-court unsworn statement made by a criminal defendant in which he fully confessed all elements of a criminal act be insufficient to establish the guilt of the Defendant for that act? The answer is obviously no, yet the Court of Appeals in its opinion says that merely because the defense of alibi was raised by the Defendant in an out-of-court unsworn statement, it is necessarily insufficient to raise the defense and necessitate a charge on alibi.

It must be noted that the State through its own witnesses introduced the evidence on which Petitioner relies and certainly they should be bound by that evidence.

CONCLUSION

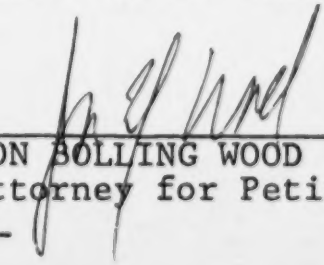
In conclusion, with respect to this reason for the granting of the Petition for Writ of Certiorari, Petitioner argues that for the trial court not to charge a criminal jury the state law which applies to the one

and only defense presented by the evidence in the case and available to the Defendant is per se a violation of the "Due Process" clause of the Fifth Amendment of the United States Constitution.

The logic and reasoning of the Court of Appeals of Georgia as expressed in its opinion is faulty and should not be left standing.

It was necessary for the trial court to charge the criminal jury in this case on the defense of alibi in order to afford the Petitioner herein his right under the Fifth and Fourteenth Amendment to the United States Constitution and because this was not done, the trial court commited error; the Court of Appeals erred in affirming the opinion of the trial court and the Supreme Court of the State of Georgia erred in denying the Writ of Certiorari from the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,



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59832. SMITH v. THE STATE.

SOGNIER, Judge.

Smith was convicted in the Superior Court of Catoosa County of rape. On appeal he contends the trial court erred by failing to charge on the defense of alibi. The defense presented no evidence in this case. However, prior to trial, Defendant made out-of-court statements to an FBI agent and a deputy sheriff, neither of which were under oath. The FBI agent and the deputy sheriff later testified as to these two out-of-court statements. Based on this evidence, Appellant contends the trial court should have charged the jury on the defense of alibi, even without request, pursuant to the holding in Henderson v. State, 148 Ga. App. 659 (252 SE2d 83) (1979). However, Henderson provides that this rule applies where alibi is the sole defense and "where there is some evidence to support it." Id., at 661. These

prior statements of Appellant, repeated in court by the state's witnesses, are insufficient to raise the defense of alibi. Even assuming that they did, our Supreme Court has held: "'This court has upon many occasions ruled that it is not error to fail to charge on alibi when there is no request therefor and the onoy basis for alibi consist of a Defendant's unsworn statement. (Cit.)'" Fields v. State, 232 Ga. 723, 724 (3) (208 SE2d 505) (1975). We deem this analogy controlling in this instance and accordingly, the enumeration of error is without merit.

Judgment affirmed. Deen, C. J., and Birdsong, J., concur.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, September 24, 1980

Dear Sir:

Case No. 36797, Smith vs. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

s/Mrs. Joline B. Williams
Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari from the Court of Appeals of the State of Georgia upon the following by placing a copy of same in an envelope properly addressed to him and depositing same in the United States Mail with sufficient postage thereon to reach its destination, to-wit:

The Honorable William Campbell
District Attorney
Walker County Courthouse
LaFayette, Georgia 30728

Attorney General's Office
132 State Judicial Building
Atlanta, Georgia 30334

This 11th day of Dec., 1980.

ATTORNEY FOR PETITIONER

80-1150

NO. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALVIS L. SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Whether or not the trial court erred in failing to charge the jury on the defense of alibi, when the defense made no request therefor, and when the defense tendered no evidence supporting an alibi?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Court of Appeals' decision in this case. This opinion is reported as Smith v. State, 155 Ga. App. 506, ___S.E.2d___ (1980).

STATEMENT OF THE CASE

Alvis L. Smith, Jr., hereinafter referred to as Petitioner, was indicted, tried, and convicted for the offense of rape in Catoosa County, Georgia. The evidence at trial consisted primarily of the testimony of the victim, Donna Lorane Woodall; the physician who examined her, Dr. Elizabeth Walker; and two law enforcement officers assigned to investigate the case, Walter Smartt and Charles Black.

The uncontroverted record showed that the victim was kidnapped at gunpoint on December 22, 1975, by the Petitioner. Petitioner drove the victim from Chattanooga, Tennessee to Catoosa County, Georgia where he raped her and left her stranded on the side of a road. (T. 7-17). The Petitioner was positively identified in the courtroom and at a previous police lineup as the rapist. (T. 11, 37).

An examination by a doctor revealed that the victim had an abrasion on the entry of her vagina,and based on her expert opinion the sexual intercourse had been forced. (T. 117-121).

During the trial, the State introduced two inconsistent statements made by Petitioner to two different law officers. Petitioner told F.B.I. Agent Smartt that he met the victim on three occasions in Chattanooga. (T. 98-101). Petitioner also told Catoosa County Deputy Sheriff Black that he had been with the victim on three occasions, but the location and times of these meetings were substantially different from his statements to Smartt. He did state, however, that he had never been to Georgia with the victim. (T. 108). Petitioner did not put forward any evidence on his own behalf, (T. 122), and at no time during the trial did he account for his whereabouts on December 22, 1975.

At no time during the trial was sworn testimony tendered as to the potential impossibility of the Petitioner's presence at the scene of the offense at the time of its commission. Most importantly, at no time during the trial did the Petitioner raise the defense or request that the court instruct the jury on the defense of alibi.

The Georgia Court of Appeals held that the court is to charge the jury on the defense of alibi, even without request, only in circumstances "where alibi is the sole defense and where there is some evidence to support it." Smith v. Georgia, 155 Ga. App. 506, ___S.E.2d___ (1980). Accordingly, the Court of Appeals denied the appeal and affirmed the conviction, because the Petitioner did not raise any evidence supporting an alibi, and because he did not raise the issue of an alibi during the trial.

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN FAILING TO CHARGE THE DEFENSE OF ALIBI WHEN THE DEFENSE MADE NO REQUEST THEREFOR, AND WHEN THE DEFENSE TENDERED NO EVIDENCE SUPPORTING AN ALIBI.

(A) THE COURT IS ONLY OBLIGATED TO CHARGE THE DEFENSE OF ALIBI WHEN IT IS THE PETITIONER'S SOLE DEFENSE, OR WHEN HE REQUESTS IT.

The court's duty to charge on the defense of alibi was set out most recently in Henderson v. State, 148 Ga. App. 659, 252 S.E.2d 83 (1979). The Court of Appeals noted that "both this court and the Supreme Court (of Georgia) have consistently held

that where alibi is the sole defense of the accused, the failure of the trial court to charge on the defense of alibi, even in the absence of a request, is a reversible error where there is some evidence to support it." Id. at p. 661.

The thrust of the Petitioner's application for a writ of certiorari is that the afore-cited rule mandates court instruction on the defense of alibi, because the Petitioner's statements to the investigating officers were unequivocal in their meaning that Petitioner had never been with the victim in Catoosa County, Georgia, the scene of the crime charged against him.

Careful examination of the rule in Henderson, supra, reveals that the court is obligated to charge only when alibi "is the sole (emphasis added) defense of the accused . . . " Id. at p. 661. Although

sworn testimony of the accused, in and of itself, may be sufficient to raise the defense of alibi, such a situation is not before the Court. Instead, Petitioner relies on two conflicting statements which were not made under oath, and which did not establish his whereabouts on the date of the crime.

In summation, the courts in this State have indicated, either expressly or by necessary implication, that as a threshold consideration, the evidence must support the alibi defense, and when it does so, an instruction, even though not requested, is ordinarily required. In the case at bar, the trial court was not obligated to give an unrequested alibi instruction to the jury because no evidence was tendered that raised a "reasonable doubt" as to the impossibility of Petitioner's presence at the scene of the crime.

(B) PETITIONER'S OUT OF COURT, INCONSISTENT, UNSWORN STATEMENTS ARE INSUFFICIENT TO RAISE A DUTY TO CHARGE ON ALIBI.

The Petitioner contends that his out of court unsworn statements, as testified to by the two investigating officers, were sufficient to raise the defense and necessitate the charge of alibi. The pertinent state statute on alibi as a defense, directs that it,

> ". . . involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as to exclude the possibility of presence." Ga. Code Ann. § 38-122.

In interpreting this statute the Supreme Court of Georgia in Hunt v. State, 229 Ga. 869, 195 S.E.2d 31 (1972), faced a similar issue to that in this case, and stated:

> "It is not error to fail to charge on alibi when there is no request therefor and the only basis for alibi consists of a defendant's unsworn statement." Id., at p. 870; accord, Wynes v. State, 182 Ga. 434, 436, 185 S.E. 711 (1936); Bagley v. State, 212 Ga. 206, 207, 91 S.E.2d 506 (1956); Bryant v. State, 229 Ga. 60, 62, 189 S.E.2d 435 (1972).

Furthermore, before a charge on the defense of alibi will be required, "the range of the evidence with respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence." Colbert v. State, 149 Ga. App. 266, 268, 353 S.E.2d 885 (1979). In the case at bar, on the other hand, "the evidence relating to alibi is not clear and of strong probative value, [and] the failure to charge thereon, in the absence of a proper request, should not be cause for a reversal." Callahan v. State, 147 Ga. App. 301 (1978).

As detailed in the statement of the case, the Petitioner did not tender any evidence as to his whereabouts on the date of the rape. Moreover, Petitioner's two conflicting statements to the law enforcement officers were indicative of his inability to give the officers a clear statement of his activities when he was with the victim. Thus, under the Callahan, supra, rationale, the trial court was not required to charge, sua sponte, on alibi.

Petitioner claims that the rule in Henderson supra, requires an instruction on alibi any time there is "some" evidence, even if the only evidence was the defendant's uncorroborated, unsworn, out of court statement. Nevertheless, in this case, there was no evidence of Petitioner activities on the night Ms. Woodall was raped, other than the evidence which proved him to be the assailant. As noted earlier, this included a positive identification by the victim.

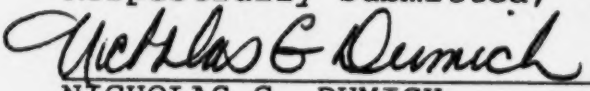
As in Georgia, the federal courts likewise do not require an instruction on the defense of alibi, absent a request, if the evidence and circumstances do not warrant one. See, e.g., United States v. Stirone, 311 F.2d 277, 281 (3rd Cir. 1962), cert. den., 372 U.S. 935, rehng. den., 372 U.S. 981 (1962); United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975), cert. den., 425 U.S. 905 (1976).

Accordingly, this Court should decline to grant the writ of certiorari in this case.

CONCLUSION

For all the above and foregoing reasons, it is respectfully requested that the petition for a writ of certiorari in the present case be denied.

Respectfully submitted,



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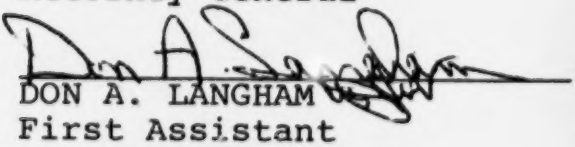

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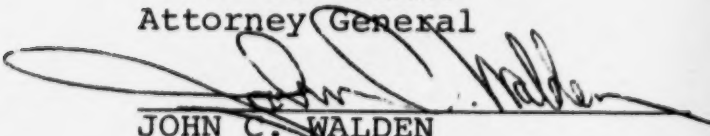

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, a member of the Bar of this Court, and Attorney of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner, by depositing same in the United States mail, with adequate postage thereon and addressed to:

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Attorney at Law
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This 15th day of January, 1981.

/S/
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